Online Platforms and Selective Distribution : Coty Ruling Addresses Topical E-Commerce Issues

Havu, Katri Annikki

2019-04

Havu , K A & Zupancic , N 2019 , ' Online Platforms and Selective Distribution : Coty Ruling Addresses Topical E-Commerce Issues ' , European law review , vol. 44 , no. 2 , pp. þÿ 2 2 2 2 3 7 .

http://hdl.handle.net/10138/313805

Online Platforms and Selective Distribution: Coty Ruling Addresses Topical E-Commerce Issues

Havu, K.
Zupancic, N.

This is a pre-copyedited, author-produced version of an article accepted for publication in European Law Review following peer review. The definitive published version (Havu, K. & Zupancic, N., Online Platforms and Selective Distribution: Coty Ruling Addresses Topical E-Commerce Issues 2019, European law review 44, 2, p. 222–237) is available online on Westlaw UK or from Thomson Reuters DocDel service.

Online Platforms and Selective Distribution: *Coty* Ruling Addresses Topical E-Commerce Issues

Katri Havu[*]
University of Helsinki

Neža Zupančič[**]
Higher Court of Ljubljana

Abstract
This contribution discusses the preliminary ruling in *Coty* (C-230/16) in which the European Court of Justice addresses competition law ambiguities pertaining to selective distribution, in particular with respect to the use of third-party online platforms as a distribution channel. Importantly, the judgment confirms that suppliers of luxury products can prohibit authorised distributors from selling goods on general online platforms. This contribution analyses the ruling and discusses selective distribution, preserving a luxury or prestigious product image, and vertical agreements in the context of e-commerce.

E-commerce; EU competition law; Luxury goods; Online platforms; Selective distribution

Introduction

Online sales and distribution are highly topical as EU competition law issues. The EU Digital Single Market (DSM) Strategy seeks to boost e-commerce and, as a corollary, to tackle competition concerns in digital markets. According to the European Commission (Commission), e-commerce still holds untapped potential, but it can notably benefit both companies and consumers, especially if central legal issues are optimally resolved.[1]

The increasing significance of online distribution affects the practices of undertakings in terms of control over the retail sale of their products. Suppliers may begin to analyse whether they should engage more actively in distribution and retail, whether selective distribution systems would be useful, and what the policy should be with respect to selling products to consumers via general, independent online platforms or marketplaces such as Amazon or eBay.[2] The practical implications of these issues affect both consumers and dealers in the distribution chain.

The preliminary ruling of the European Court of Justice (ECJ) in *Coty*[3] was expected to clarify some of the contemporary legal problems of selective distribution, third-party online platforms, and luxury products.[4] Selective distribution refers to

---

[*] LLD, Adjunct Professor of European Law, Assistant Professor of Private Law.
[**] LLM, Judicial Intern. The views set out in this article are those of the authors. The authors wish to thank the anonymous peer reviewer and editor Jukka Snell for valuable comments.
[1] See, e.g. Commission, "A Digital Single Market Strategy for Europe" COM(2015) 192 final, pp.3–6, 17–19.
[2] See, e.g. Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, paras 10–15, 24–40, 50–53. As to Amazon and eBay see, e.g. *https://www.amazon.co.uk*; *http://www.ebay.com* [accessed 1 April 2018]. See also, e.g. P. Marsden and P. Whelan, "Selective Distribution in the Age of Online Retail" (2010) 31 E.C.L.R. 26.
[3] *Coty Germany GmbH v Parfümerie Akzente GmbH* (C-230/16) EU:C:2017:941.

> "a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system".[5]

Selective distribution is used in the context of high-quality goods (as broadly understood) and where maintaining a brand image and/or ensuring correct use of products is central. Under EU competition law, vertical agreements on selective distribution may fall entirely outside the scope of the prohibition of art.101(1) of the Treaty on the Functioning of the EU (TFEU). Further, even if a particular vertical agreement is caught by art.101(1) TFEU, it may still be acceptable (exempted) on the basis of art.101(3) TFEU,[6] as further elaborated by block exemptions, in particular the Vertical Block Exemption Regulation 330/2010 (VBER).[7]

Selective distribution systems that meet the so-called "*Metro* criteria" are not competition infringements within the meaning of art.101(1) TFEU. The *Metro* test requires that distributors are chosen on the basis of objective qualitative criteria that are uniform for all potential resellers and applied in a non-discriminatory fashion, that product characteristics necessitate a selective distribution system—for example to preserve quality—and that the criteria laid down do not go beyond what is necessary.[8] Before *Coty*, ambiguity existed regarding the distribution of luxury or prestige products and assessment under art.101(1) TFEU: paragraph 46 of the *Pierre Fabre* judgment, which concerned cosmetics and personal care products, makes what seems like a clear statement that maintaining a prestigious product image is not a legitimate aim that would justify restricting competition.[9] If read without the factual and legal context of the case, this passage might create confusion. Nevertheless, as explained in *Coty*, the statement in *Pierre Fabre* is context-specific and concerns the treatment of a particular contract clause (a total online sales ban) but not justifications for selective distribution systems in general.[10] *Coty* confirms that a restraint aimed at preserving a luxury image may well be compatible with art.101(1) TFEU.

---

[4] See, e.g. Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, para.38; A. Ezrachi, "The Ripple Effects of Online Marketplace Bans" (2017) 40 World Competition 47, 55–60; P. Ibáñez Colomo, "Case C-230/16, Coty: a Straightforward Issue with Major Implications" (16 February 2017), *https://chillingcompetition.com/*, *https:// chillingcompetition.com/2017/02/16/case-c-23016-coty-a-straightforward-issue-with-major-implications/* [accessed 1 April 2018].

[5] Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, art.1(1)(e).

[6] Under art.101(3) TFEU, the prohibition of competition restricting contracts may be declared inapplicable in the case of an agreement which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable, or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[7] Regulation 330/2010 [2010] OJ L102/1.

[8] See *Metro SB-Großmärkte v Commission* (26/76) EU:C:1977:167 at [20]–[21]; *L'Oréal v De Nieuwe AMCK* (31/80) EU:C:1980:289 at [15]–[16]; *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence in Ministre de l'Économie, de l'Industrie et de l'Emploi* (C-439/09) EU:C:2011:649 at [40]–[41].

[9] *Pierre Fabre* (C-439/09) EU:C:2011:649 at [46]: "The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU."

[10] *Coty* (C-230/16) EU:C:2017:941 at [29]–[35]. See also Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [75]–[88], [107]–[108].

Restrictions on using the internet for distribution constitute a theme that intertwines with—and extends beyond—issues of selective distribution. The primary approach of EU competition law is stringent as to online (re)sale restrictions or restrictions on a distributor's right to use the internet: these are easily seen as illicit restrictions of competition under art.101(1) TFEU. An absolute ban on online sales (even by an authorised distributor itself) was found to constitute a competition restriction "by object" in *Pierre Fabre.*[11] Nevertheless, imposing less significant restrictions, or restrictions that are truly legitimate considering the nature of contract products, may, subject to case-contextual assessment, be compatible with art.101(1) TFEU.[12] In case a vertical agreement is caught by art.101(1) TFEU, and the applicability of exemptions (art.101(3) TFEU and the VBER) therefore needs to be analysed, restrictions on online sales may be considered hardcore restrictions which remove the benefit of the block exemption.[13]

Before *Coty*, the issue has been open as to how online marketplace bans, express or de facto, concerning third party-operated platforms should be evaluated in the context of selective distribution. Both the evaluation under art.101(1) TFEU and the applicability of exemptions (art.101(3) TFEU and the VBER) have been unclear.[14] Guidance by the ECJ is invaluable, as ambiguities in EU law create the risk, and indeed even a prevalence, of divergent interpretations and conclusions in Member States.[15] The significance of earlier case law has not been evident due to a lack of clarity as to the relevance of the difference between prohibiting use of third-party platforms and a total online sales ban. Moreover, as regards exemptions in particular, one of the most detailed EU law sources discussing relevant themes has been a soft law document, namely the Guidelines on Vertical Restraints (Vertical Guidelines), which describes how the Commission interprets the law.[16]

The Commission, which analysed online marketplace or platform bans in its E-commerce Sector Inquiry, has suggested that the distinction between own websites and third-party platforms is decisive from the standpoint of competition rules. The Commission submits that online marketplace bans need to be analysed on a case-by-case basis as to their overall compatibility with EU competition law, and should not be regarded as hardcore restrictions under arts 4(b)–4(c) of the VBER.[17] In *Coty*, the ECJ's

[11] *Pierre Fabre* (C-439/09) EU:C:2011:649 at [47], [60].
[12] See *Pierre Fabre* (C-439/09) EU:C:2011:649 at [39]–[47].
[13] See Regulation 330/2010 [2010] OJ L102/1, art.4; *Pierre Fabre* (C-439/09) EU:C:2011:649 at [53]–[59]; Commission, Guidelines on Vertical Restraints (2010/C 130/01) paras 52, 54, 56. See also further, e.g. A. Gurin and L. Peeperkorn, "Vertical Agreements" in J. Faull and A. Nikpay (eds), *The EU Law of Competition,* 3rd edn (Oxford: OUP, 2014), pp.1363, 1400–1402.
[14] See, e.g. Commission, "Staff Working Document Accompanying the document Final Report on the E-commerce Sector Inquiry" SWD(2017) 154 final, paras 499–507; Ezrachi, "Marketplace Bans" (2017) 40 World Competition 53–65; S. Wartinger and L. Solek, "Restrictions of Third-Party Platforms within Selective Distribution Systems" (2016) 39 World Competition 291.
[15] See, e.g. national judgments: *Scout* (U 8/09 Kart) of the Kammergericht Berlin (Higher Regional Court, Berlin, Germany), 19 September 2013; *Deuter* (U 84/14) of the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany), 22 December 2015; *Caudalie* (No 15/01542) of Cour d'appel de Paris (Court of Appeal, Paris, France), 2 February 2016. See also, e.g. these decisions by national competition authorities: *Adidas* (B3-137/12) of the Bundeskartellamt (national competition authority, Germany), 27 June 2014; *ASICS* (B2-98/11) of the Bundeskartellamt, 26 August 2015; *Samsung et al* (No 14-D-07) of L'Autorité de la concurrence (national competition authority, France), 23 July 2014. See also, e.g. Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [1], [76]; M. De la Mano and A. Jones, "Vertical Agreements Under EU Competition Law: Proposals for Pushing Article 101 Analysis, and the Modernization Process, to a Logical Conclusion" TLI Think! Paper 59/2017, *SSRN*, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930943* [accessed 1 April 2018], pp.23–25.
[16] Commission, Guidelines on Vertical Restraints (2010/C 130/01).
[17] Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, paras 38, 41–43; Commission, "Staff Working Document Accompanying the document Final Report on the E-commerce Sector

reasoning is similarly constructed. The ruling indicates that a selective distribution agreement prohibiting the use of third-party platforms in a discernible manner cannot automatically be considered problematic (neither under art.101(1) TFEU nor under art.4 of the VBER).

In brief, the *Coty* judgment provides much-needed clarification on selective distribution. Additionally, the detailed Opinion by Advocate General (AG) Wahl, essentially followed by the ECJ, involves a systematic analysis of relevant EU law.

Further Notes on the VBER

The VBER sets out—pursuant to art.101(3) TFEU and subject to more detailed conditions—that the prohibition on competition-restricting agreements in art.101(1) TFEU will not apply to vertical restrictions in vertical agreements (VBER art.2). Agreements that include hardcore restrictions may not benefit from this block exemption (VBER art.4). A vertical agreement that aims to restrict the territory in which, or the customers to whom, a retailer may sell contract goods generally removes the benefit of the block exemption.[18] However, as an exception, art.4(b)(iii) allows "restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system", thus signifying that the core ideas underpinning selective distribution are compatible with the block exemption.

In general, the provisions of the VBER on restrictions that remove the benefit of the block exemption concern both offline and online sales.[19] In terms of background to *Coty*, it may be further noted that retail level members of a selective distribution system cannot be restricted regarding active or passive sales to end-users—and that prohibiting online sales significantly hinders passive sales.[20] Nonetheless, imposing quality standards upon distributors' online sales is compatible with the VBER.[21]

***Coty*: Facts and Background**

The main proceedings in *Coty* concerned a dispute between the applicant, Coty Germany GmbH (Coty), a supplier of luxury cosmetics, and the defendant, Parfümerie Akzente GmbH (Akzente), an authorised distributor, over a contract clause prohibiting retailers from using a non-authorised third party in the context of internet sales. In applying a selective distribution network contract and a supplemental agreement, Coty had brought an action before a national court of first instance, the Landgericht Frankfurt am Main (Frankfurt-am-Main Regional Court), seeking an order prohibiting Akzente from distributing contract products via the "amazon.de" platform.[22] After the national court

---

Inquiry" SWD(2017) 154 final, paras 499–514, 980–982. The Commission cites its earlier view in the Guidelines on Vertical Restraints (2010/C 130/01), para.54 (noting that requiring use of online platforms only in line with what has been agreed between the supplier and the distributor is acceptable from the standpoint of Regulation 330/2010 [2010] OJ L102/1).

[18] Without prejudice to a restriction on a retailer's place of establishment. Regulation 330/2010 [2010] OJ L102/1, art.4(b).

[19] See also Commission, Guidelines on Vertical Restraints (2010/C 130/01), paras 47–58.

[20] See Regulation 330/2010 [2010] OJ L102/1, art.4(c); *Pierre Fabre* (C-439/09) EU:C:2011:649; Commission, Guidelines on Vertical Restraints (2010/C 130/01) paras 52, 56–57.

[21] See Regulation 330/2010 [2010] OJ L102/1, art.4; Commission, Guidelines on Vertical Restraints (2010/C 130/01) paras 52, 54, 56.

[22] See *Coty* (C-230/16) EU:C:2017:941 at [8]–[16].

dismissed the application—finding the relevant contractual clause contrary to art.101(1) TFEU and the corresponding national provision—Coty appealed that decision.[23]

The court hearing the appeal, the Oberlandesgericht Frankfurt am Main (Frankfurt-am-Main Higher Regional Court), was aware of the legal ambiguities outlined above. Further, the appellate court observed that relevant EU law, and the judgment in *Pierre Fabre* in particular, had been the subject of divergent interpretations by national competition authorities and courts.[24] The national court, therefore, decided to stay the proceedings and refer four questions for a preliminary ruling. The first question inquired, from the standpoint of art.101(1) TFEU, about the general evaluation of selective distribution systems that have as their aim the distribution of luxury goods and primarily serve to ensure a "luxury image" for the goods.[25] In essence, the issue was whether safeguarding a luxury image is a legitimate reason for imposing restrictions. The second question continued by inquiring whether it constitutes

> "an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system operating at the retail level of trade are prohibited generally from engaging third-party undertakings discernible to the public to handle internet sales, irrespective of whether the manufacturer's legitimate quality standards are contravened in the specific case?"[26]

In addition, the national court inquired about the interpretation of arts 4(b)–4(c) of the VBER (on hardcore restrictions that remove the benefit of the block exemption), asking whether a prohibition on engaging third-party undertakings discernible to the public to handle internet sales that is imposed on the members of a selective distribution system constitutes a restriction on the retailers' customer group "by object", and whether such a prohibition constitutes a restriction of passive sales to end-users "by object".[27]

Opinion of the Advocate General

By way of background, AG Wahl noted that selective distribution may contribute to diversification of goods and quality, even though, in principle, it also creates restrictions on competition.[28] Further, the ECJ has previously recognised the legality of selective distribution systems based on qualitative criteria.[29] Selective distribution helps maintain brand image and stimulates inter-brand competition. Not only do luxury brands derive added value from a particular way in which products are presented, but selective distribution may also enable a brand to penetrate geographically distant markets while ensuring that the brand is represented in the same—presumably high-quality—manner.[30] In selective distribution, all distributors are subject to the same criteria and conditions: their playing field is level. Intra-brand (price) competition is limited, as is the number of distributors. Nevertheless, the

---

[23] See *Coty* (C-230/16) EU:C:2017:941 at [17]–[19].
[24] See *Coty* (C-230/16) EU:C:2017:941 at [19]; Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [6], [29].
[25] Request for a preliminary ruling from the Oberlandesgericht Frankfurt am Main (Germany)—*Coty Germany GmbH v Parfümerie Akzente GmbH* (C-230/16) [2016] OJ C260/21; *Coty* (C-230/16) EU:C:2017:941 at [20].
[26] *Coty* (C-230/16) EU:C:2017:941 at [20].
[27] *Coty* (C-230/16) EU:C:2017:941 at [20].
[28] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [32]–[36], [46]–[47]. See also *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* (Joined Cases 56/64 and 58/64) EU:C:1966:41.
[29] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [37]–[39]; *Metro* (26/76) EU:C:1977:167.
[30] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [41]–[43].

organisers of selective distribution are not incentivised to behave anti-competitively: restricting the criteria for joining their systems to an ultimately anti-competitive degree would result in extremely limited distribution of goods, loss of market and loss of consumers.[31] Because of differing possible effects, selective distribution must be evaluated on a case-by-case basis.[32]

As to preliminary ruling questions one and two, the AG took the view that a selective distribution system aimed at preserving the luxury image of luxury or prestige products should be viewed as compatible with art.101(1) TFEU.[33] He underlined that if the *Metro* criteria are fulfilled, a selective distribution system is not caught by art.101(1).[34] Moreover, the *Metro* criteria had to be observed even in evaluating an individual contract clause. AG Wahl concluded that a clause prohibiting the discernible use of third-party platforms could be justified, proportionate and otherwise lawful, but noted that this would be for the national court to determine.[35]

The AG clarified that the issue underpinning the third and fourth questions was whether the clause at issue restricted territory and/or customers, or passive sales, within the meaning of the VBER.[36] He remarked that since undertakings themselves must evaluate the applicability of the exemption granted under art.101(3) TFEU and the VBER, the interest of legal certainty requires robust self-evaluation criteria.[37] AG Wahl noted that it was not evident that the contract clause at issue should be considered a restriction within the meaning of art.4(b) of the VBER. Further, no obvious, distinguishable geographical areas or groups of consumers would be lost to the distributor as a consequence of a prohibition on the discernible use of third-party platforms. Additionally, such a prohibition did not preclude online sales altogether and thus did not restrict passive sales to end-users within the meaning of art.4(c) of the VBER.[38] Hence, the prohibition should not be considered a restriction of customers or passive sales under arts 4(b)–4(c).[39]

Ruling by the ECJ

The ECJ reasoned similarly to the AG but the judgment is significantly more concise. With respect to the first question, the ECJ emphasised that selective distribution systems are compatible with art.101(1) TFEU if the *Metro* criteria are met.[40] As to the issue of whether selective distribution might be necessary in the case of luxury goods, the ECJ, recalling earlier case law, explained that the quality of luxury goods originates not only from their properties but also from an "aura of luxury" related to their prestigious image and allure. The aura enables consumers to distinguish those products, and any damage to the aura could damage the quality.[41] Selective distribution systems which ensure that products are displayed and marketed so as to enhance their luxury image can contribute to maintaining an aura of luxury and thus quality. Further, luxury goods may be considered to *require* a

[31] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [44].
[32] See Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [45]–[52].
[33] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [62]–[63], [70], [157].
[34] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [65]–[66], [93].
[35] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [96], [99]–[122], [157]. See also *Pierre Fabre* (C-439/09) EU:C:2011:649 at [41]–[43].
[36] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [125].
[37] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [127]–[132].
[38] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [138], [140]–[156].
[39] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [157].
[40] *Coty* (C-230/16) EU:C:2017:941 at [24], [36]. See also fn.8.
[41] *Coty* (C-230/16) EU:C:2017:941 at [25]. See also *Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL)* (C-59/08) EU:C:2009:260 at [24]–[26]. Note also earlier judgments by the General Court, in particular *Leclerc v Commission* (T-88/92) EU:T:1996:192 at [105]–[117].

selective distribution system in order to preserve quality.[42] Therefore, if the *Metro* criteria are met, a selective distribution system designed to preserve a luxury image is compatible with art.101(1) TFEU.[43]

The ECJ continued by addressing diverging interpretations of *Pierre Fabre* (also put forward by parties and interveners). The ECJ underlined that paragraph 46 of *Pierre Fabre*, concerning art.101(1) TFEU, must be interpreted in a case-contextual light. In *Pierre Fabre*, a contract term completely precluded online sales, and the products could hardly have been considered luxury goods but rather cosmetic and hygiene products. Further, the compatibility of the entire selective distribution system with competition law was not at issue. Thus, the reasoning observable in *Pierre Fabre* was not directly applicable to a case such as the one before the Court.[44]

With respect to the second question—concerning the lawfulness under art. 101(1) TFEU of a clause prohibiting the discernible use of third-party platforms in the distribution of luxury goods—the ECJ emphasised the relevance of the *Metro* criteria, and that it is for the referring court to determine whether these criteria are met.[45] The ECJ observed that fulfilment of the criterion concerning proportionality was still to be assessed, while other criteria appeared to have been met in the particular circumstances of the case.[46]

The ECJ proceeded to provide the national court "with all the points of interpretation of EU law" for evaluating fulfilment of the remaining criterion.[47] First, the ECJ discussed the *appropriateness* of the platform ban, concluding that it was appropriate. The ECJ noted, for example, that as the object was to ensure that goods would be exclusively associated with authorised distributors, a prohibition on using third-party platforms in a discernible manner was a limitation "coherent in the light of the specific characteristics of the selective distribution system".[48] Further, the prohibition provided a guarantee for the supplier that its products would be sold in an environment corresponding to the qualitative conditions agreed with authorised distributors. Since the supplier had no legal recourse against third parties (platform operators) in terms of requiring compliance with quality standards, distribution via platforms would involve a "risk of deterioration of the online presentation" of the goods, so that the luxury image might be harmed.[49]Additionally, the exclusivity of online shops for particular products contributed to a luxury image and to preservation of one of the main characteristics of the goods.[50]

Next, the ECJ examined whether the prohibition *went beyond what is necessary* to achieve its objective. The ECJ again rejected the analogy with *Pierre Fabre*—the clause at issue in *Coty* allowed sales via the distributors' own online shops, and even through third-party platforms as long as these were used in an indiscernible way.[51] Moreover, the ECJ remarked that the Commission's E-commerce Sector Inquiry suggests that distributors generally consider their own online shops as the main

---

[42] *Coty* (C-230/16) EU:C:2017:941 at [26]–[28]. See also *Copad* (C-59/08) EU:C:2009:260 at [28]–[29]; *L'Oréal* (31/80) EU:C:1980:289 at [16].
[43] *Coty* (C-230/16) EU:C:2017:941 at [29], [24], [36].
[44] *Coty* (C-230/16) EU:C:2017:941 at [29]–[35]; *Pierre Fabre* (C-439/09) EU:C:2011:649.
[45] See *Coty* (C-230/16) EU:C:2017:941 at [37]–[38], [40]–[41], [58]. See also *Pierre Fabre* (C-439/09) EU:C:2011:649 at [41]–[43].
[46] *Coty* (C-230/16) EU:C:2017:941 at [41]–[43].
[47] *Coty* (C-230/16) EU:C:2017:941 at [41]–[57].
[48] *Coty* (C-230/16) EU:C:2017:941 at [44]–[45].
[49] *Coty* (C-230/16) EU:C:2017:941 at [47]–[49].
[50] *Coty* (C-230/16) EU:C:2017:941 at [50].
[51] See *Coty* (C-230/16) EU:C:2017:941 at [52]–[53].

distribution channel.[52] Consequently, the prohibition did not appear to go beyond what was necessary to preserve the luxury image of the goods. It was noted that the prohibition seemed lawful but it was for the national court to conduct the final evaluation, applying the *Metro* criteria.[53]

As to the block exemption questions, which were examined together, the ECJ emphasised that the VBER is relevant only if the agreement at issue restricts competition within the meaning of art.101(1) TFEU.[54] The ECJ continued that, in applying arts 4(b)–4(c) of the VBER, it must be resolved whether a contract pre-limits the customers to whom the goods can be sold or passive sales to end-users. The ECJ, significantly following AG Wahl's Opinion, underlined that the prohibition at issue in *Coty* did not prevent all online marketing. Furthermore, it appeared practically impossible to determine the group of third-party online platform customers that would be lost to distributors as a result of a platform ban. Moreover, regardless of the prohibition on the discernible use of third-party platforms, distributors' own online shops could be found through search engines, while authorised distributors remained able to utilise even third parties subject to certain conditions.[55] The conclusion was that the prohibition did not amount to a hardcore restriction within the meaning of arts 4(b)–4(c) of the VBER.[56] This signifies that an agreement containing a clause such as that at issue in *Coty* could benefit from the block exemption.

Discussion

Preliminary Remarks

The *Coty* ruling is essentially in line with the majority of earlier case law on selective distribution, and thus springs no great surprises. The ECJ has established that selective distribution systems based on qualitative criteria may—subject to the *Metro* test—be compatible with art.101(1) TFEU; indeed, it has become generally accepted that under certain conditions such systems may have pro-competitive effects.[57] A major implication of *Coty* is the reassurance it provides for suppliers acting as organisers of selective distribution systems. Protecting a luxury image legitimises the prohibition of sales via third-party online platforms, that is, through online channels that could negatively affect the aura of luxury. The opposite conclusion would have incentivised vertical integration (keeping the distribution network within the same company thereby securing the protection of a luxury image) as opposed to using separate distributors. By addressing ambiguities related, in particular, to evaluation under art.101(1) TFEU and interpretation of *Pierre Fabre*, the ruling in *Coty* contributes to more uniform application of EU competition law in Member States.

The *Coty* judgment discusses both the prohibition in art.101(1) TFEU and the possibility of exemption under the VBER (and art.101(3) TFEU). A *Metro* criteria fulfilling agreement on selective distribution falls outside the scope of art.101(1) TFEU, as illustrated by the ECJ's reasoning on

[52] *Coty* (C-230/16) EU:C:2017:941 at [54]. See further Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, paras 39–41.
[53] See *Coty* (C-230/16) EU:C:2017:941 at [55]–[58].
[54] *Coty* (C-230/16) EU:C:2017:941 at [59].
[55] See *Coty* (C-230/16) EU:C:2017:941 at [60]–[67]. See also Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [143]–[155].
[56] *Coty* (C-230/16) EU:C:2017:941 at [68]–[69].
[57] See fn.8, and further *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission* (107/82) EU:C:1983:293 at [33]–[35]; *Copad* (C-59/08) EU:C:2009:260. See also Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [33]–[34], [37]–[48], [64]–[66], and, e.g. L. Vogel, "Efficiency versus Regulation: The Application of EU Competition Law to Distribution Agreements" (2013) 4 Journal of European Competition Law & Practice 277.

preliminary ruling questions one and two. If an agreement is caught by the prohibition, the possibility of an exemption under art.101(3) TFEU and the VBER must be assessed—questions three and four concerned that evaluation.

Nonetheless, the terminology used by the referring court was ambiguous when referring to restraints meant in arts 4(b)–4(c) of the VBER: the national court inquired about restrictions "by object",[58] while the title of art.4 of the VBER refers to "hardcore restrictions".[59] It may be this ambiguity that has spurred discussion concerning the issue of whether the ECJ's analysis of art.4 of the VBER provides information on some more general approach to third-party platform bans. In particular, the question has been raised whether the ECJ's reasoning implies that platform bans are other than "by object" restrictions under art.101(1) TFEU.[60]

In general art.101(1) TFEU analysis, restrictions on competition are restrictions either "by object" or "by effect". The relationship between a restriction "by object" and a "hardcore restriction" may appear confusing; indeed, the expressions are even used as synonyms.[61] As underlined by AG Wahl in *Coty*, hardcore restrictions within the meaning of the VBER and restrictions "by object" under art.101(1) TFEU must be distinguished, but their characteristics may be similar and partially overlapping since in both cases assessment focuses on the harmfulness of the measure under scrutiny.[62]

It should be noted that in *Coty*, the ECJ's answers to preliminary ruling questions three and four are worded so that they strictly concern interpretation of art.4 of the VBER: the ruling clarifies that the prohibition on using third-party platforms in selective distribution of luxury goods in a discernible manner is not a hardcore restriction under arts 4(b)–4(c) of the VBER, that is, not a restriction that has as its object the restriction of customers or passive sales to end-users *within the meaning of the VBER*.[63] The ECJ did not discuss the matter of restrictions "by object" or "by effect" under the art.101(1) TFEU prohibition. While answering preliminary ruling question number two on the compatibility of a third-party platform ban with art.101(1) TFEU, the ECJ emphasised the national

[58] *Coty* (C-230/16) EU:C:2017:941 at [20].
[59] Regulation 330/2010 [2010] OJ L102/1, art.4. The text of art.4 discusses restrictions which have "as their object", for instance, restriction of customers, or restriction of active or passive sales to end-users.
[60] See, e.g. P. Ibáñez Colomo, "Case C-230/16, Coty Germany GmbH: Common Sense Prevails" (6 December 2017) *https://chillingcompetition.com/*, *https://chillingcompetition.com/2017/12/06/c%E2%80%91230-16-coty-germany-gmbh-common-sense-prevails/* [accessed 1 April 2018].
[61] For discussion, see Gurin and Peeperkorn, "Vertical Agreements" in *The EU Law of Competition* (2014), p.1390; De la Mano and Jones, "Vertical Agreements" (2017); J. Goyder, "*Cet Obscur Objet*: Object Restrictions in Vertical Agreements" (2011) 2 Journal of European Competition Law & Practice 327; A. Witt, "Restrictions on the Use of Third-Party Platforms in Selective Distribution Agreements for Luxury Goods" (2016) 12 European Competition Journal 435, 441–460. See further on restrictions "by object", e.g. D. Bailey, "Restrictions of Competition by Object under Article 101 TFEU" (2012) 49 C.M.L. Rev. 559; P. Ibáñez Colomo and A. Lamadrid de Pablo, "On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know" in B. Meyring, D. Gerard and M. Merola (eds), *The Notion of Restriction of Competition, Revisiting the Foundations of Antitrust Enforcement in Europe* (Brussels: Bruylant, 2017), pp.333, 350–358.
[62] Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [56]. See also at [116]–[117], [124]–[125], [132]–[138]. See further, e.g. *Groupement des cartes bancaires (CB) v Commission* (C-67/13 P) EU:C:2014:2204 at [53]–[58]; *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal* (C-32/11) EU:C:2013:160 at [33]–[38], [43]–[48]; *T-Mobile Netherlands and Others* (C-8/08) EU:C:2009:343 at [29].
[63] See *Coty* (C-230/16) EU:C:2017:941 at [68]–[70], and reasoning at [59]–[67].

court's assessment of the *Metro* criteria in the circumstances of the case,[64] but this does not signify that the restriction is "by effect".[65]

When caught by art.101(1) TFEU, agreements on selective distribution are restrictions "by object",[66] and in *Coty* the ECJ did not expressly depart from this. However, it can be noted that AG Wahl remarked that the prohibition on using third-party platforms in a discernible manner should not be considered a "by object" restriction under art.101(1) TFEU.[67]

In terms of general practical implications of *Coty*, it can be pointed out that for practising lawyers and companies, the "logic" of art.101 TFEU/VBER analysis is often reversed: it is usually considered reasonable to first assess the overall applicability of the VBER, including the relevance of market share thresholds, and then proceed to a detailed evaluation of the agreement under art.101 TFEU only after finding that a contract is unlikely to benefit from the block exemption.[68] *Coty* does not significantly affect this general (and partially problematic) centrality of *exemptions* of vertical agreements, although of course it clarifies the legal framework in situations resembling the *Coty* case.

An additional matter to highlight is the role of national courts and the ECJ, as well as cooperation between courts, when applying EU competition law, and the *Metro* criteria in particular. In *Coty*, the ECJ stated that the platform ban at issue is lawful under art.101(1) TFEU if the *Metro* criteria are met, which in turn should be determined by the referring court. Nonetheless, it was the task of the ECJ to provide the national court "with all the points of interpretation of EU law which will enable it to reach a decision".[69] This approach is also observable in earlier case law.[70] In *Coty,* the ECJ noted that meeting the other criteria appeared clear on the basis of the case file, but evaluating proportionality still remained.[71] The ECJ then discussed the criterion and its elements comprehensively.[72]

While it is generally known that the role of the ECJ is to clarify the interpretation of EU law and it remains the task of national judiciaries to apply the law to facts,[73] it is observable that national courts may in practice receive highly detailed instructions in selective distribution cases. This practice of the

---

[64] *Coty* (C-230/16) EU:C:2017:941 at [57]–[58], [70].
[65] See, e.g. *CB* (C-67/13 P) EU:C:2014:2204 at [53]–[58]; *Pierre Fabre* (C-439/09) EU:C:2011:649 at [34]–[47].
[66] See *Pierre Fabre* (C-439/09) EU:C:2011:649 at [39].
[67] Wahl underlined that the concept of restriction "by object" should only refer to restrictions that are so obviously harmful that evaluation of the effects is unnecessary, and that the concept should be interpreted restrictively. See Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [116]–[118], and further *CB* (C-67/13 P) EU:C:2014:2204 at [58]. See, however, e.g. Ezrachi, "Marketplace Bans" (2017) 40 World Competition 59–65. The author draws attention to, e.g. possible cumulative effects of platform bans and the practical significance of platforms from the consumer standpoint.
[68] For illustration see, e.g. Van Bael & Bellis, "Reflections on the Coty Judgment of the Court of Justice: Consequences for Platform Restrictions and Selective Distribution" (Van Bael & Bellis, 15 December 2017), *https://www.vbb.com/media/Insights_Articles/VBB_Coty_judgment_reflections_15.12.17.pdf* [accessed 1 April 2018], pp.5–7. Compare to *Coty* (C-230/16) EU:C:2017:941 at [59].
[69] *Coty* (C-230/16) EU:C:2017:941 at [40]–[41].
[70] See in particular *L'Oréal* (31/80) EU:C:1980:289 at [14]–[20]. See also Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [66]–[70].
[71] *Coty* (C-230/16) EU:C:2017:941 at [42]–[43].
[72] See *Coty* (C-230/16) EU:C:2017:941 at [44]–[58].
[73] See, e.g. *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio* (C-295/97) EU:C:1999:313. See also, e.g. A. Arnull, *The European Union and its Court of Justice*, 2nd edn (Oxford: OUP, 2006), pp.96, 104–114; N. Fennelly, "The National Judge as Judge of the European Union" in A. Rosas, E. Levits and Y. Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (The Hague: Asser Press, 2013), pp.61, 77–78.

ECJ could be said to intertwine the interpretation of EU law with the application of that law to the facts. In other words, national courts are left with little room for discretion.

Prohibition of the Discernible Use of Third-Party Platforms versus Total Ban on Online Sales

Interpretation of *Pierre Fabre*

Coty makes it clear that the controversial paragraph 46 of *Pierre Fabre* (on art.101(1) TFEU) is to be interpreted narrowly and read in the context of that case. Thus, *Coty* settles ambiguities stemming from the relationship between *Pierre Fabre* and other case law on selective distribution.[74] As for selective distribution systems "for luxury goods designed, primarily, to preserve the luxury image of those goods" and their compatibility with art.101(1) TFEU, the state of EU law is now clearer. The ruling in *Coty* underlines that third-party platforms significantly differ from an authorised distributor's own website in that the supplier no longer has proper control over the presentation and image of goods when sold on such platforms.[75]

Effects of Prohibiting and Allowing Online Sales and Third-Party Platforms in Vertical Agreements

With a view to practical or economic effects, prohibiting the use of third-party platforms differs significantly from a *total prohibition on online sales* in distribution.[76] The restrictive nature of a total online sales ban was underlined when the ECJ found such a ban a restriction "by object" in *Pierre Fabre*.[77] In light of that ruling, it appears in theory possible that a total online sales ban passes the *Metro* test in an individual case where for instance the nature of the contract product genuinely legitimises the ban, but this is not likely to happen often.[78] E-commerce is a major catalyst for (price) competition, and an attempt to avoid distribution via the internet must be seen against this background. An absolute prohibition on online sales has appreciable implications in terms of reaching customers outside a distributor's local area, and essentially prevents passive sales. Moreover, it can be apparent that such a prohibition does not produce notable pro-competitive effects and that it is not a proportionate measure to address risks of counterfeiting and free-riding.[79]

A prohibition of the *discernible use of third-party platforms*, for its part, signifies that a type of online sales is precluded, although otherwise selling and marketing on the internet remains possible. The

---

[74] See *Coty* (C-230/16) EU:C:2017:941 at [29]–[35]; *Pierre Fabre* (C-439/09) EU:C:2011:649, and further, e.g. *L'Oréal* (31/80) EU:C:1980:289 at [15]–[16]; *AEG-Telefunken* (107/82) EU:C:1983:293 at [33]; *Leclerc* (T-88/92) EU:T:1996:192 at [105]–[117]. See also Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [69]–[117].

[75] See *Coty* (C-230/16) EU:C:2017:941 at [36], [47]–[56], [70].

[76] See also *Coty* (C-230/16) EU:C:2017:941 at [32]–[35], [52]–[56], [65]; Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [74]–[117].

[77] *Pierre Fabre* (C-439/09) EU:C:2011:649 at [38]–[47].

[78] See *Pierre Fabre* (C-439/09) EU:C:2011:649 at [43]–[47]. The ECJ concludes at [47]: "a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object ... where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified." Additionally, at [44], the ECJ notes, citing case law on the freedoms of movement, that it has not accepted "arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales".

[79] See also, e.g. Opinion of AG Mazák in *Pierre Fabre* (C-439/09) EU:C:2011:113 at [39]–[57].

prohibition facilitates preserving the guarantees of quality and identification of the origin of products and contributes to protecting a brand in the face of the phenomena of counterfeiting and free-riding/parasitism.[80] Under this kind of prohibition, the extent to which third parties are actually relied on in distribution depends on the usefulness of indiscernible cooperation and on the arrangements third parties are willing to agree on.[81] In some situations, a prohibition on the discernible use of platforms may in practice have the same effects as a total platform ban.

In the case of a prohibition of *any use of third-party platforms*, sales through the distributors' own online stores again remain possible. Other practical implications depend on several factors, such as the type of product and the size of the distributor company. For example, the role of platforms in sales of clothing, shoes, and consumer electronics is already notable in the EU.[82] In particular, small and medium-sized companies benefit from the infrastructure (such as regarding payments) and visibility provided by third-party platforms.[83] Further, the significance of general online platforms is greater in some geographical areas.[84] Nevertheless, the E-commerce Sector Inquiry suggests that currently even absolute third-party platform bans do not generally amount to de facto prohibitions of online sales.[85]

As an aside, it can be remarked that online marketplaces themselves benefit from being able to provide a large selection of products and brands. It is not surprising that an industry lobby group, to which several major platform operators belong, should issue a statement arguing for the limited relevance of *Coty* for products other than luxury products.[86]

It may be argued that the *Coty* ruling reduces competition in consumer sales.[87] Nonetheless, this is not the case in practice if suppliers choose between utilising a selective distribution system with a third-party platform ban and arranging distribution themselves without using general platforms. Further, as underlined by the ECJ and the AG, focusing solely on price competition would be misguided in this context: selective distribution may promote inter-brand competition, specialist trade and

---

[80] See *Coty* (C-230/16) EU:C:2017:941 at [44]–[54], [67], and further Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [101]–[106]; Commission, "Staff Working Document Accompanying the document Final Report on the E-commerce Sector Inquiry" SWD(2017) 154 final, paras 45–49, 310–321, 478–487.

[81] Platform operators are often major companies with significant bargaining power. See also ECORYS, "Business-to-Business Relations in the Online Platform Environment, Final Report" (FWC ENTR/300/PP/2013/FC-WIFO, European Commission, 2017), pp.11–22.

[82] See, e.g. Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, paras 39, 41; Commission, "Staff Working Document Accompanying the document Final Report on the E-commerce Sector Inquiry" SWD(2017) 154 final, paras 504–505.

[83] See, e.g. Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, paras 14, 39, 41; Commission, "Staff Working Document Accompanying the document Final Report on the E-commerce Sector Inquiry" SWD(2017) 154 final, paras 365–366, 504, 514. See also Ezrachi, "Marketplace Bans" (2017) 40 World Competition 49–50.

[84] See, e.g. Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, paras 39, 41; Commission, "Staff Working Document Accompanying the document Final Report on the E-commerce Sector Inquiry" SWD(2017) 154 final, paras 504, 514.

[85] Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, para.41.

[86] See H. Greenfield, "Court of Justice of the EU Delivers Judgment in Coty Germany Case on Online Marketplace Bans" (Computer and Communications Industry Association CCIA, 6 December 2017), *http://www.ccianet.org/2017/12/court-of-justice-of-the-eu-delivers-judgment-in-coty-germany-case-on-online-marketplace-bans/* [accessed 1 April 2018].

[87] See, e.g. the previous fn., and PYMNTS, "EU Says Luxury Retailers Can Keep Their Goods off of Amazon" (PYMNTS, 6 December 2017), *https://www.pymnts.com/*, *https://www.pymnts.com/news/regulation/2017/amazon-eu-luxury-coty/* [accessed 1 April 2018]. See also Wartinger and Solek, "Restrictions of Third-Party Platforms" (2016) 39 World Competition 300.

diversification of goods, and thus benefit consumers.[88] Moreover, in e-commerce, price competition is intensified by the new possibilities of the digital environment (that affect transparency and monitoring prices), which may overemphasise price at the cost of product quality.[89] Therefore, contractual arrangements aimed at protecting quality or diversification may be considered even more beneficial than previously. Additionally, price competition in online sales of non-luxury cosmetics, for example, may remain essentially unaffected by the *Coty* ruling, so that consumers preferring low prices, and possibly lower quality, continue to benefit from platform-fuelled competition.

Vertical Agreements and the Online Environment: Further Remarks

The ECJ's approach to the interpretation of arts 4(b)–4(c) of the VBER is reasonable and in line with the Commission's views. The fact that "third-party platform customers" cannot be distinguished as a clearly separate group and the fact that online sales and marketing remain possible regardless of a prohibition on the discernible use of third-party platforms, signifies that another interpretation would not have been easy to justify. The wording of the provisions does not indicate that a third-party platform ban was meant to be included in the hardcore restraints, and no evident market partitioning or customer-sharing results from such a ban.[90] If, in the future, it is possible to recognise the group of third-party platform customers and clearly distinguish this group from customers who make their purchases via other channels,[91] then the nature of a third-party online marketplace ban as a restriction on customers, or territories, would have to be reconsidered.

Moreover, as AG Wahl underlined, legal certainty, predictability, and the purpose of the VBER require that hardcore restrictions within the meaning of art.4 of the VBER are as easy to recognise as possible.[92] Thus, the provision should not be interpreted over-broadly. However, even where no hardcore restrictions within the meaning of art.4 of the VBER are present, general incompatibility with art.101(3) TFEU could still render a vertical agreement illegal. The applicability of a block exemption signifies that an agreement is presumed lawful, but this does not signify that there would be a final decision regarding the matter. The Commission and national competition authorities have the power to withdraw the benefit of a block exemption in a particular case if they find that an exemption is not justified.[93] In practice, though, such withdrawals do not appear common.[94]

---

[88] See *Coty* (C-230/16) EU:C:2017:941 at [24]–[28], [44]–[47]; Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [33], [68]–[70], [101]–[106].

[89] See, e.g. Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, paras 11–15; Commission, "Staff Working Document Accompanying the document Final Report on the E-commerce Sector Inquiry" SWD(2017) 154 final, paras 16–126, 147–157, 602–608, 965–966. For earlier discussion see, e.g. V. Robertson, "Online Sales under the European Commission's Block Exemption Regulation on Vertical Agreements: Part 1" (2012) 33 E.C.L.R. 132, 134–135.

[90] See *Coty* (C-230/16) EU:C:2017:941 at [64]–[69]; Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [143]–[155]; Regulation 330/2010 [2010] OJ L102/1, arts 4(b)–4(c). See also Commission, Guidelines on Vertical Restraints (2010/C 130/01), paras 50, 52, 54.

[91] See also Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [150]. See for discussion Wartinger and Solek, "Restrictions of Third-Party Platforms" (2016) 39 World Competition 299–300 (the authors present arguments in favour of considering third-party platform customers as a separate group).

[92] See Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [129]–[132]. See also *Pierre Fabre* (C-439/09) EU:C:2011:649 at [56]–[58].

[93] See, in particular, Regulation 330/2010 [2010] OJ L102/1, recitals 5, 10, 13–15 (and also art.6 concerning declarations on non-application of the Regulation); Commission, Guidelines on Vertical Restraints (2010/C 130/01), para.23; Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, art.29.

[94] See also, e.g. F. Wijckmans and F. Tuytschaever, *Vertical Agreements in EU Competition Law*, 2nd edn (Oxford: OUP, 2011), pp.260–264.

Discussion is ongoing regarding the revision of rules and guidelines applicable to vertical restraints in the EU. The need to adapt the treatment of vertical agreements to the problems of digital markets has particularly been highlighted by commentators.[95] Further, the Commission has recognised that the current Vertical Guidelines and the VBER are not necessarily optimal for resolving dilemmas in the online environment. Commissioner Vestager has emphasised the importance of gathering experience from assessing new cases, and observed that following the development of digital markets is essential.[96] The E-commerce Sector Inquiry included the conclusion that revising the VBER—which expires in May 2022—need not be carried out earlier than originally planned. Nonetheless, the Commission notes that Sector Inquiry data, as well as information gathered in the context of targeted enforcement triggered by the Inquiry, will contribute to future review.[97]

Moreover, legal issues related to online platforms, and the position and behaviour of major platforms, are comprehensively scrutinised under the DSM Strategy.[98] This work, which entails analysis from the standpoint of different fields of law, including unfair contract term issues, is still in progress, but may have implications for contractual chains that include platforms.[99]

All in all, the legal framework applicable to vertical agreements in digital markets is developing, although slowly. In any case, the *Coty* ruling, the VBER, the Vertical Guidelines and the Commission's approaches currently form a significantly coherent whole with respect to treatment of third-party platform bans in selective distribution.

Quality, Luxury and Prestige

Competition law analysis of selective distribution under art.101(1) TFEU enquires whether contractual restrictions are necessary in order to protect product quality or to ensure proper product use.[100] Nevertheless, the case law terminology is more nuanced and discusses not merely quality but also "prestige" and "luxury".[101] Luxury products are one group of products whose quality may require protection.[102] In any event, the specific relevance of luxury for the ECJ's reasoning is of interest in

[95] See, e.g. Ezrachi, "Marketplace Bans" (2017) 40 World Competition 64–65; De la Mano and Jones, "Vertical Agreements" (2017), pp.16–34.
[96] See M. Vestager, "Competition policy for the Digital Single Market: Focus on e-commerce" (Speech at the Bundeskartellamt International Conference on Competition, Berlin, 26 March 2015), *http://europa.eu/rapid/press-release_SPEECH-15-4704_en.htm* [accessed 1 April 2018].
[97] Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, para.74. As to vertical restraints in the online environment, see further, e.g. paras 24–27, 42–43. The period of validity of Regulation 330/2010 [2010] OJ L102/1 is noted in art.10.
[98] See, e.g. Commission, "A Digital Single Market Strategy for Europe" COM(2015) 192 final, pp.9–12.
[99] See, e.g. Commission, "Communication, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe" COM(2016) 288 final; Commission, "Staff Working Document, Online Platforms, Accompanying the document Communication on Online Platforms and the Digital Single Market" SWD(2016) 172. See also ECORYS, "Business-to-Business Relations in the Online Platform Environment" (2017).
[100] See, e.g. *L'Oréal* (31/80) EU:C:1980:289 at [15]–[16].
[101] See *Coty* (C-230/16) EU:C:2017:941 at [25]–[29], [34]–[42], [70]; *Pierre Fabre* (C-439/09) EU:C:2011:649 at [45]–[46].
[102] The intrinsic value of luxury under competition law has been to some extent contentious, as is also observable in the divergent views of the parties and interveners in *Coty* (C-230/16) EU:C:2017:941, and in the debate triggered by the case, e.g. Ibáñez Colomo, "Common Sense Prevails" (2017). For earlier discussion see, e.g. Witt, "Restrictions on the Use of Third-Party Platforms" (2016) 12 European Competition Journal 435; V. Pruzhansky, "Luxury Goods, Vertical Restraints and Internet Sales" (2014) 38 European Journal of Law and Economics 227, 243–245.

assessing the implications of *Coty*. The ruling affirms that "a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods" complies with art.101(1) TFEU as long as the *Metro* criteria are met.[103] The same applies to a prohibition on the discernible use of third-party platforms.[104] These conclusions appear to strictly focus on luxury goods. Luxury goods are also mentioned in the answer regarding interpretation of art.4 of the VBER.[105]

As regards the ECJ's detailed analysis of art.4 of the VBER, luxury is of no visible significance, and *Coty* reveals no differences in evaluation between luxury goods and other products. As seen above, the ECJ focused on the potential effects of a platform ban.[106] On the basis of the contents and wording of arts 4(b)–4(c) of the VBER, the luxury nature of contract products is not relevant.[107]

With respect to the interpretation of art.101(1) TFEU, the involvement of luxury products and a luxury image seems to have been a major reason for arriving at a different conclusion than that in *Pierre Fabre*.[108] Further, the ECJ recalled the trademark case of *Copad*, where the quality of luxury goods was expressly linked with their allure, prestigious image and aura of luxury.[109] Relying significantly on *Copad*, the ECJ concluded that luxury goods may require a selective distribution system in order to preserve quality, and therefore a system designed "to preserve the luxury image" is legal.[110] While discussing the second preliminary ruling question about the platform ban, the ECJ also used the expressions "luxury and prestige goods" and "the image of luxury and prestige".[111] Thus, guidance by the ECJ on art.101(1) TFEU is limited to luxury (and prestige) products. Nevertheless, the argument concerning the absence of contractual relationships between the supplier and third-party platforms and the related lack of possibilities to control presentation of products could apply more generally to preserving *quality*.[112] Even more broadly, reasoning analogous to that observable in *Coty* could be utilised in the context of different kinds of products, when it comes to potentially harming or protecting quality, or even a particular "aura".[113]

Coty confirms that the treatment of luxury products under competition law is analogous to that in trademark cases. While this expression of consistency of EU law is welcome, competition law differs from trademark law in terms of the manner in which it is determined whether the product image requires particular protection. In competition matters, the ECJ enjoys notable discretion in defining luxury or high-quality products. In *Coty*, the role of the ECJ as the final "arbiter of luxury" is visible

---

[103] *Coty* (C-230/16) EU:C:2017:941 at [36], [70]. Compare to *Pierre Fabre* (C-439/09) EU:C:2011:649 at [46].
[104] *Coty* (C-230/16) EU:C:2017:941 at [58], [70]: "a contractual clause ... which prohibits authorised distributors in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms ...".
[105] See *Coty* (C-230/16) EU:C:2017:941 at [69]–[70].
[106] *Coty* (C-230/16) EU:C:2017:941 at [62]–[68].
[107] See also further Commission, Guidelines on Vertical Restraints (2010/C 130/01), e.g. paras 54, 175–176. In general, the Guidelines do not analyse the relevance of luxury or prestige separately, although quality is discussed in some places. See also Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [156]–[157].
[108] See *Coty* (C-230/16) EU:C:2017:941 at [32], [34]–[35].
[109] See *Coty* (C-230/16) EU:C:2017:941 at [25]–[29]; *Copad* (C-59/08) EU:C:2009:260 at [24]–[25]. See also, e.g. *Parfums Christian Dior SA and Parfums Christian Dior BV* (C-337/95) EU:C:1997:517 at [45]. Note also *Leclerc* (T-88/92) EU:T:1996:192 at [105]–[110].
[110] See *Coty* (C-230/16) EU:C:2017:941 in particular at [26]–[28], [36], [70]. For earlier discussion see, e.g. Witt, "Restrictions on the Use of Third-Party Platforms" (2016) 12 European Competition Journal 455–457.
[111] See *Coty* (C-230/16) EU:C:2017:941 at [38], [42].
[112] See *Coty* (C-230/16) EU:C:2017:941 at [47]–[56].
[113] See also Opinion of AG Wahl in *Coty* (C-230/16) EU:C:2017:603 at [91]–[92]: the AG argues that the reasoning concerning compatibility with art.101(1)TFEU is applicable to other quality goods in addition to luxury products. For discussion see, e.g. Van Bael & Bellis, "Coty Judgment" (2017), p.7.

in a comparison between the facts of *Pierre Fabre* and *Coty*, with the Court noting on the contract products of the *Pierre Fabre* case that: "the goods ... were not luxury goods, but cosmetic and body hygiene goods.[114] However, the difference between the contract products in *Coty* and in *Pierre Fabre* is not self-evident.

Concluding Remarks

Coty clarifies several matters but it is not exhaustive. Legal issues of platform bans as well as other matters pertaining to contract terms designed to protect product image may continue to pose challenges. Additionally, the practical application of the *Metro* criteria (art.101(1) TFEU assessment) may be an exercise where national competition authorities and courts reach partially diverging conclusions. Besides, the importance of third-party platforms compared to distributors' own online stores appears to vary from one Member State to another.[115] This is relevant for evaluating the practical significance and proportionality of a third-party platform ban.[116] Similarly, the role of general online marketplaces may change with time, affecting the assessment of platform bans under the *Metro* criteria.

Moreover, in *Coty*, preliminary ruling questions two to four were narrow and context-specific. In turn, the ECJ carefully limited its answers to the particular issues raised by the referring court. For example, the ECJ only addressed the issue of platform bans in the context of selective distribution, while the treatment of such bans outside selective distribution remains partially open.[117] Nevertheless, in contexts other than selective distribution, the practical role of platform bans is often less central. Generally, reasons for adopting platform restrictions and selective distribution systems are similar and therefore these two easily coincide.[118]

In all, the ECJ's reasoning concerning third-party online platform bans in *Coty* is an important addition to the law of digital markets. *Coty* is without doubt a central case for contemporary EU competition law.

---

[114] *Coty* (C-230/16) EU:C:2017:941 at [32]. See also *Pierre Fabre* (C-439/09) EU:C:2011:649 at [36].
[115] See fn.84. See also, e.g. Y. Botteman and D. Barrio Barrio, "The Coty Exception: A Luxury for a Selected Few?" (Kluwer Competition Law Blog, 15 December 2017), *http://competitionlawblog.kluwercompetitionlaw.com/*, *http://competitionlawblog.kluwercompetitionlaw.com/2017/12/15/coty-exception-luxury-selected/* [accessed 1 April 2018].
[116] Further, the central role of general online marketplaces in some Member States appears to contribute to the emergence of comments arguing for limited relevance *Coty*. See, e.g. H. Anger, "Luxus muss nicht in die Schmuddelecke" (Handelsblatt, 6 December 2017), *http://www.handelsblatt.com/*, *http://www.handelsblatt.com/unternehmen/handel-konsumgueter/eugh-urteil-zum-online-handel-das-urteil-wird-noch-geprueft/20677236-2.html* [accessed 1 April 2018], reporting the views of President A. Mundt of the Bundeskartellamt (national competition authority, Germany). See also, of pre-*Coty* decisions, e.g. *ASICS* (B2-98/11), Bundeskartellamt, 26 August 2015.
[117] See also Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, paras 38, 43; Commission, "Staff Working Document Accompanying the document Final Report on the E-commerce Sector Inquiry" SWD(2017) 154 final, paras 514, 980–982.
[118] See also, e.g. Commission, "Final Report on the E-commerce Sector Inquiry" COM(2017) 229 final, para.40; Commission, "Staff Working Document Accompanying the document Final Report on the E-commerce Sector Inquiry" SWD(2017) 154 final, paras 183, 232–235, 470, 476–492.